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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	GEN Docket No. 90-314
)	ET Docket No. 92-100
)	
Amendment of the Commission's)	RM-7140, RM-7175, RM-7617,
Rules to Establish New Personal)	RM-7618, RM-7760, RM-7782,
Communications Services)	RM-7860, RM-7977, RM-7978,
)	RM-7979, RM-7980
)	

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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January 8, 1993

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY.....	1
I. CABLE COMPANIES ARE POTENTIAL PROVIDERS OF EFFICIENT PCS INFRASTRUCTURES.....	3
A. The Use of Existing Infrastructures Can Benefit PCS Licenses.....	3
B. Cable Companies Are Potential Providers of PCS Infrastructures.....	5
C. Commission Policies Should Foster the Development of Competitive Infrastructures.....	6
1. Telephone Network Interconnection.....	6
2. Safeguards.....	7
3. Minimal Oversight of Non-Telco Infrastructures.....	8
II. PCS SHOULD BE CLASSIFIED AS A PRIVATE LAND MOBILE SERVICE.....	9
III. ALL ENTITIES SHOULD BE ELIGIBLE TO APPLY FOR PCS LICENSES, BUT NONE SHOULD NOT BE FAVORED.....	11
A. The "Set-Aside" Policies Previously Applied to Mobile Services Should Not Apply to PCS.....	12
B. No Firms Should Be Excluded From Seeking PCS Licenses.....	14
IV. THE COMMISSION SHOULD ALLOCATE AT LEAST 90 MHZ to PCS.....	15
V. THE COMMISSION SHOULD USE LOTTERIES TO AWARD LICENSES; REGIONAL OR LOCAL LICENSES SHOULD BE AWARDED.....	16
VI. THE COMMISSION SHOULD ACCORD PCS LICENSES A FEDERAL RIGHT TO INTERCONNECT TO THE TELEPHONE NETWORK.....	19
VII. TECHNICAL STANDARDS SHOULD NOT UNNECESSARILY IMPINGE ON THE MARKETPLACE EVOLUTION of PCS.....	21
CONCLUSION.....	22

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REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. (NCTA), by its attorneys, submits the following "Reply Comments" in the above-captioned proceeding.

NCTA is the principal trade association of the cable television industry. Its members provide cable television services to approximately 90 percent of the nation's 56 million cable television subscribers. NCTA members are conducting PCS experiments and considering involvement in PCS as a potential licensee and as a provider of an "infrastructure" to licensees.

INTRODUCTION AND SUMMARY

Several years ago, the Commission began a process to examine whether new personal communications services (PCS) are technically and economically feasible, and if they are feasible, whether authorization of these services is in the public interest. The Commission issued an initial Notice of Inquiry to gather information, authorized numerous experimental licenses and

devoted significant staff resources to the study of the potential for the service.

The Commission now believes that enough is known to adopt rules and to proceed to award licenses. It has issued a comprehensive Notice of Proposed Rulemaking (NPRM) that seeks comment on the full range of issues, including spectrum allocation, licensing, number of providers, market size, eligibility of providers of cellular and telephone services, and technical standards.

NCTA fully endorses the Commission's decision to proceed expeditiously. The evidence adduced from the experiments undertaken by cable companies, and the investigations conducted by the cable industry's technical consortium Cable Television Laboratories, Inc. (Cable Labs), shows that PCS is "ready" for the marketplace. Regulatory delays should not impede the provision of a service that will so obviously benefit consumers and promote economic growth.

In the following reply comments, NCTA describes the special role that cable companies can play as providers of PCS infrastructures, and advocates regulatory policies that favor competitive infrastructures. We call for the classification of PCS as a "private" service because it qualifies legally, and because the regulatory arrangements that follow from private status will facilitate the prompt and efficient delivery of service. We believe that all firms should be eligible to apply for licenses, regardless of whether they are now offering other

communications services. And, we explain that the mandating of a federal right to network interconnection is essential.

NCTA further believes that at least 90 MHz should be allocated to PCS, but takes no position on the number of licenses. We support the award of licenses through a lottery process as the only viable alternative under existing law. Our comments favor regional or local licenses. Finally, we offer selected observations regarding PCS technical standards.

I. CABLE COMPANIES ARE POTENTIAL PROVIDERS OF EFFICIENT PCS INFRASTRUCTURES

The principal purpose of this proceeding is to establish rules for PCS. The NPRM focuses on regulations and policies that apply to licensees that provide service to end users. The licensees will necessarily rely on an "infrastructure" to support their operations. In the course of developing regulations and policies for PCS licensees, the Commission should be sensitive to the implications of its decisions for the infrastructure component.

A. The Use of Existing Infrastructures Can Benefit PCS Licensees

A recent paper prepared by David P. Reed of the Commission's Office on Plans and Policy (Reed Report) identifies

the major elements of the PCS infrastructure.^{1/} These elements include (1) operations, administration and maintenance (OAM) services; (2) an advanced signaling network with intelligent nodes; (3) switching; (4) transport; (5) cell sites; and (6) handsets. Except for handsets, which will be available to the consumer on a stand-alone basis, each licensee needs to acquire these infrastructure elements.

Licensees certainly have the option of "starting from scratch." Every one of the components of the infrastructure can be "purchased" by the licensee. Signaling, switching, transport and cell site equipment are available from outside vendors. OAM services can be provided by a newly established company work force. This option may not, however, provide the most efficient solution to the needs of licensees. And, less than optimal infrastructure options are likely to result in higher infrastructure costs which will be passed on to end users in the form of higher retail prices. The higher retail prices will retard the development of the service, tending to delay or prevent the realization of economies of scale by licensees and manufacturers.

Licensees and consumers will be better off if they have the choice of obtaining infrastructure components from entities that already utilize these components in the course of offering other

1/ Reed, "Putting It All Together; The Cost Structure of Personal Communications Services," OPP Working Paper No. 28, Office of Plans and Policy, Federal Communications Commission, November 1992 (Reed Report).

communications services. The Reed Report accurately identifies telephone, cellular and cable companies as potential providers of PCS infrastructure components.^{2/}

B. Cable Companies Are Potential Providers of PCS Infrastructures

The cable industry's active involvement in the PCS experimental process has been prompted by the recognition that there may be significant synergies between cable and PCS infrastructure operation. More than a dozen cable-affiliated firms, pursuant to Commission experimental licenses, are conducting technical evaluations of PCS capabilities at a variety of frequencies. In addition, Cable Labs has been engaged in a comprehensive evaluation of technical and operational issues.

Investigations by individual companies and Cable Labs have found that PCS is one of the services that can be provided over the new system architecture that the cable industry is now deploying. The new architecture is not being developed exclusively in response to the potential of PCS. Instead, it is a by-product of a design that is expected to enhance the capability of cable's video distribution system and make possible the provision of a wide array of additional services.

Critical to the evolution of cable networks is the inclusion of fiber trunks from the central headend of the cable system to

^{2/} Reed Report at 29-45.

"fiber hubs" that, in the most recent experimental design, are centrally located among approximately 2,000 homes passed. Coaxial cable is used to distribute communications services from the hubs to subscriber homes. Time Warner's Queens, New York system uses this design which, in conjunction with a 1 GHz downstream distribution facility, permits additional channels for multi-channel pay-per-view, reduced use of amplifiers resulting in lower equipment costs, and a greatly improved carrier-to-noise ratio which facilitates enhanced picture quality. The additional capacity is available to distribute other services, including alternative transport and PCS.

C. Commission Policies Should Foster the Development of Competitive Infrastructures

The Commission should adopt policies that promote, and do not hinder, the initiation and development of PCS infrastructures by cable companies and others. If the telephone company infrastructure is the only alternative available to PCS licensees, telephone companies may be able to dominate PCS and capture most of the profits available from the service even if they are not licensees. Toward this end, the Commission should formally recognize the benefits of multiple PCS infrastructures.

1. Telephone Network Interconnection

PCS licensees may choose to arrange for infrastructure components from more than one entity. For example, in particular circumstances it may be most beneficial to obtain transport from

the cable company and switching from the telephone company. To this end, telcos should be required to offer infrastructure elements on an unbundled basis. Past telephone industry interconnection practices discouraged competition from alternative access providers by bundling access arrangements and forcing customers needing individual components to purchase a whole package. In light of the telephone industry's continuing resistance to expanded interconnection, the Commission should prescribe the unbundling of infrastructure components in telephone company tariffs for PCS infrastructure arrangements.^{3/}

2. Safeguards

The presence of telephone company incentives and ability to utilize their position in local exchange services to dominate infrastructure arrangements requires that the Commission apply competitive safeguards and devote the resources necessary to make the safeguards work. If telephone companies act on these incentives, particularly in the early stages of the market's development, anticompetitive and anticonsumer consequences are likely to result. For example, without effective safeguards telephone companies may cross-subsidize competitive PCS operations, provide discriminatorily favorable interconnection arrangements to affiliates, and bundle monopoly telephone and competitive PCS services. The regulatory tools available under

^{3/} See pp. 19-20, infra.

Title II of the Communications Act should be applied to preserve competition to telephone company infrastructures.^{4/}

3. Minimal Oversight of Non-Telco Infrastructures

It is equally essential that the Commission apply only minimal oversight to competitive infrastructures. In Section II, below, NCTA urges the Commission to classify PCS as a "private land mobile service," rather than as a common carrier service. Cable infrastructures will also qualify as "private" because, under the test laid out in National Association of Regulatory Utilities Commissioners v. FCC, the undertakings between PCS licensees and cable companies will be the result of "individualized decisions, in particular cases, whether and on what terms to deal."^{5/} (In contrast, as a common carrier, the telephone company "undertakes to carry for all people indifferently.")^{6/} By classifying cable and other non-telco provided infrastructures as "private," the Commission will prevent excessive regulation from impeding the development of competitive infrastructures.

4/ See, generally, pp. 14-15, infra.

5/ National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976).

6/ Id.

II. PCS SHOULD BE CLASSIFIED AS A PRIVATE LAND MOBILE SERVICE

The Commission has discretion under the Communications Act to classify PCS as common carriage or private land mobile service (PLMS). Choosing the regulatory classification is one of the most fateful decisions required of the Commission. If PCS is classified as common carriage, it is potentially subject to comprehensive federal and state regulation. If the PLMS classification is selected, minimal oversight will be the result. Since PCS licensees will face competition from landline telephone companies, cellular companies, competing PCS companies and others, the Commission can rely on the marketplace to perform the role required of regulation in noncompetitive markets. It follows that PCS should be classified as private land mobile service.

Congress added Section 332 of the Communications Act, the PLMS classification, to the range of available regulatory options in 1982. A subsequent court ruling interpreting the statute held that

In enacting section 332 (c) (1), Congress directed the Commission to deregulate the market and add, modify or delete mobile services, as the need arises, consistent with [the statute's] guidelines... That section allows the FCC, when faced with future technological and public policy advances, to create new systems that will make more efficient use of the spectrum...

7/ Telocator Network of America v. FCC, 761 F.2d 763, 768 (D.C. Cir. 1985).

PCS is the type of service that this direction was intended to cover.

In the NPRM, the Commission states that "the test for private land mobile service is that a licensee not resell interconnected telephone service for profit."^{8/} The Commission makes clear that its classification decision will depend, to some extent, on whether prospective providers of PCS intend to or are allowed to resell interconnected telephone service for a profit. But the analysis does not end there. The statutory resale test is itself subject to an additional threshold, namely

whether the private system is licensed to multiple licensees or shared by authorized users and, if so, whether the system is interconnected with the public switched telephone network. Only if both of these conditions are met will a further assessment be made of whether the entity providing the interconnection is reselling for profit telephone exchange service or facilities.^{9/}

Since there is no evidence that a PCS system "will be licensed to multiple licensees or shared by authorized users," PCS may be classified as a private land mobile service.

Even though the Commission has clear statutory authority to classify PCS as a private land mobile service, there remains the policy question of whether the service ought, nevertheless, to be

8/ Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd. 5676 (1992).

7/ American Teltronix, 5 FCC Rcd. 1955, 1956 (1990) (citation omitted, emphasis supplied)

treated as common carriage. Common carrier classification will give the Commission, and the states, the power to closely supervise and comprehensively regulate the service. But the costs of implementing common carrier regulation of PCS will far exceed the benefits.

If PCS were an essential service provided by a single entity, without any close substitutes, common carrier treatment would be essential. That is not, however, the case. PCS is expected to compete with cellular and, for some users, complement landline telephone service. Moreover, the award of multiple PCS licenses and the expected market presence of private wireless alternatives will tend to minimize the possible exercise of market power by PCS licensees. The Commission can confidently rely on the limited regulatory apparatus available for the private land mobile service classification, in combination with competitive forces, to achieve efficiently functioning PCS markets.

III. ALL ENTITIES SHOULD BE ELIGIBLE TO APPLY FOR PCS LICENSES, BUT NONE SHOULD BE FAVORED

The Commission seeks comment on whether firms that now provide communications services ought to be favored, barred or restricted as PCS licensees. NCTA believes that all should be allowed to enter, but none should be favored. Telephone companies, however, capable of utilizing their control of local distribution facilities to disadvantage unaffiliated PCS

competitors, should be permitted to enter only if they are subject to effective safeguards.

A. The "Set-Aside" Policies Previously Applied to Mobile Services Should Not Apply to PCS

The Commission has used its spectrum allocation authority in prior years to favor particular types of providers of mobile services. In 1949, when the Commission established common carrier mobile service on a commercial basis, separate frequency allocations were made for wireline and non-wireline carriers "to foster the growth of radio common carrier enterprises that would compete with telephone companies offering mobile communications."^{10/} The Commission subsequently reiterated its adherence to this policy.^{11/}

The issue of separate wireline/non-wireline allocations arose again when the Commission established the cellular service. This time, however, the Commission's decision was not premised on the promotion of competition, but on the prompt availability of service.^{12/} The pre-divestiture AT&T was found to have technical expertise that made it uniquely capable of promptly relieving

10/ Cellular Communications Systems, referencing General Mobile Radio Service, 13 F.C.C. 1190, 1218, recons. denied 13 F.C.C. 1242 (1949).

11/ See ITT Mobile Telephone, Inc. 18 R.R. 2d 937 (1963); Allocation of Frequencies (Guardband), 12 F.C.C. 2d, recons. denied 12 F.C.C. 2d 269 (1968).

12/ Cellular Communications Systems, 86 F.C.C. 2d 489-490 (1981) (Report and Order).

congestion then experienced on conventional mobile frequencies.^{13/} The separate allocation was found also to minimize the delay that would result from comparative hearings.

None of the considerations that have led the Commission to adopt set-aside policies for other mobile services are present for PCS. The Commission's experimental process has demonstrated conclusively that the technical expertise needed to deliver PCS is broadly shared. There is no issue of mobile service congestion that can be relieved expeditiously only by the award of licenses in all markets to a chosen entity. The mandatory award of licenses to existing mobile service providers is, if anything, likely to hinder rather than promote competition because existing providers of communications services may not have the incentive to fully promote a new service that competes with existing services.^{14/} There is no basis for awarding PCS

13/ Id.

14/ In considering whether local exchange carriers should be eligible to provide cellular service, the Commission questioned

[W]hether some potential entrants may have an incentive to restrict the supply of cellular service, or otherwise limit its potential, as a means of maintaining their investment in their other services or equipment. [A supply constraint] could result in an artificial increase in the price that consumers pay for communications services or in the carrier's failure to allow the cellular system to grow and evolve fully (both technologically and in service applications).

(Footnote continues on next page)

assignments to a firm just because the firm already provides other communications services.

B. No Firms Should Be Excluded From Seeking PCS Licenses

NCTA believes not only that no companies should be favored in the PCS licensing process, but also that none should be excluded from applying. While NCTA recognizes that there may be a strong case for preventing wireline carriers from seeking PCS licenses within their telephone service areas, these considerations are outweighed by the benefits of an open entry policy. At the same time, the obvious anticompetitive risks of telco entry warrant the adoption of competitive safeguards.

The potential risks of a telephone company becoming a PCS licensee are evident. If PCS is a complement for other services of wireline carriers, such as cellular service, telephone companies might have a disincentive to fully develop the PCS service, thereby depriving consumers of the full benefits of PCS.^{15/}

(Footnote continued)

Cellular Communications Systems (Notice of Inquiry and Notice of Proposed Rulemaking), 78 F.C.C. 2d 984, 993 (1980).

15/ Cf., id. (describing similar disincentives in the context of cellular services).

NCTA has maintained that telephone companies should be allowed to provide transmission services for voice, data and video, subject to appropriate safeguards in recognition of their dominant position in local telecommunications. We have, for example, never opposed the provision by telephone companies of regulated video facilities to franchised cable operators. Only where telcos are able to leverage their dominant position in telecommunications transmission to gain unfair advantage in adjacent communications businesses -- e.g. in video services and enhanced services -- has NCTA favored excluding telcos.

Unlike those businesses, PCS involves the offering of transmission capacity and PCS companies will face competition from cellular service and wireline telephone service. There will be at least two, and possibly more providers of PCS in each market. The selection process is unlikely to result in local wireline carrier operation in every market. NCTA does not, therefore, oppose the entry of wireline carriers, subject to appropriate safeguards that will assist the Commission in policing anticompetitive and anticonsumer practices.

IV. THE COMMISSION SHOULD ALLOCATE AT LEAST 90 MHZ to PCS

The record in this proceeding shows sufficient demand exists for PCS to warrant the allocation of spectrum. But existing users occupy portions of the chosen band. One of the Commission's principal tasks is to resolve the competing claims for scarce spectrum. The overwhelming evidence is that the potential benefits of PCS to consumers and to the economy are so

great that, after a transition period, existing alternative spectrum users must be forced to yield.

The Commission proposes to allocated 90 MHz to PCS, and tentatively concludes that three entities should be licensed per market. The spectrum will be located between 1850 MHz and 1990 MHz, a band of frequencies which the Commission has identified as having propagation characteristics that are well suited to the service. While NCTA expects that demand for wireless services will eventually require additional allocations of spectrum, 90 MHz is a good start.

NCTA takes no position on the division of the PCS allocation among successful licensees. We recognize that the Commission's task is to balance the competing benefit of a larger number of licenses against the efficiency losses resulting from the smaller allocation. The task is complicated because, irrespective of the selected market size, licensees will find incumbents using different amounts of spectrum, and operating at different points in the spectrum bands. As a result, arriving at a uniform national approach will be especially challenging. The Commission should, therefore, strongly consider allocation schemes that take account of local conditions.

V. THE COMMISSION SHOULD USE LOTTERIES TO AWARD LICENSES;
REGIONAL OR LOCAL LICENSES SHOULD BE AWARDED

Aside from determining the number of licenses per market, the Commission must resolve two other licensing issues. It must choose the method by which licenses are to be awarded. And, it

must decide the scope of license areas.

There are three possible methods for selecting licenses: auctions, comparative hearings and lotteries. Since the Commission does not have statutory authority to conduct auctions, comparative hearings and lotteries are the only available choices. Of these options, a lottery process is the only real alternative.

Comparative hearings have the theoretical advantage of identifying the "best" provider of service. But they are expensive and time-consuming. The legal and expert fees will be borne ultimately by customers. The hearing process, followed by Commission reviews and court appeals, is almost certain to delay the availability of service. At the end of the process, it will not be clear at all that the "winner" of the hearing will offer significantly better service.

After initially deciding to select non-wireline cellular licenses through comparative hearings, and using that process to choose licensees in the top 30 markets, the Commission opted for lotteries. The Commission explained that lotteries would speed up awards and thereby the availability of service, and there was no evidence that a properly implemented lottery would result in the licensing of an "unqualified" applicant or in the diminution of service quality. Moreover, the comparative process sometimes

results in service proposals that are virtually impossible to compare and the costs of comparative hearings are "enormous."^{16/}

The set of considerations that persuaded the Commission to implement a lottery process for cellular apply equally well to PCS. Once the Commission determines that firms entering the lottery meet threshold criteria, the lottery process is the most efficient way to choose among licensees. All lottery participants, having satisfied the threshold criteria, are technically and financially qualified to provide service. The time and expense devoted in the comparative process toward the selection of the "best" applicant are not justified when the differences between applicants are at best marginal. The balance of considerations weighs heavily in favor of lotteries.

The Commission seeks comment on the market size of individual PCS licenses. It specifically asks whether license areas should be drawn in accordance with the 487 Rand McNally "basic trading areas," the 47 Rand McNally "major trading areas," the 194 LATAs, or on a national basis. NCTA does not support national licenses; local or regional licensing will provide the greatest opportunity for the largest number of companies to participate in PCS.

NCTA has no opinion among the remaining geographic options. The Commission may decide that the proposed regional/local

16/ Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C. 2d 175, 184-92 (1984).

options, or other options that come to light through the comment process, are most desirable. Our review of the options presented suggests that credible arguments are available for each.

VI. THE COMMISSION SHOULD ACCORD PCS LICENSEES A FEDERAL RIGHT TO INTERCONNECT TO THE TELEPHONE NETWORK

The Commission proposes to "confirm explicitly" that PCS licensees have a federally protected right to interconnect to the Public Switched Telephone Network (PSTN). Network access is essential to the viability of PCS as a commercial service. There is no basis in law or policy to permit telephone companies to deny access. The service will benefit if all licensees, from the start, have available uniform access options. Commission action is the only way to ensure this result.

In the past, telephone companies have used their control of the telephone network to disadvantage mobile service competitors. Radio common carriers authorized by the Commission in 1949 did not generally enjoy network access until the early 1960's, while their wireline competitors were able to offer customers direct access to the telephone network. Decades later, non-wireline cellular licensees were forced into extended negotiations with telephone company representatives before achieving satisfactory interconnection arrangements. The Commission can and must prevent a repeat of history by mandating interconnection arrangements in the rulemaking process, and monitoring the situation subsequently.

The NPRM recognizes that licensees may prefer different interconnection options. Rather than endorse specific options, it wisely proposes that the PCS provider will be "entitled to obtain a type of interconnection that is reasonable for the particular PCS system and no less favorable than that offered by the LEC to any other carrier or customer."^{17/} The Commission points out that if the particular arrangement is already offered, it is technically feasible. The Commission has ample ancillary authority under Titles I and II to require these interconnection arrangements irrespective of the classification of PCS as common carriage or private carriage.

NCTA agrees that the Commission should preempt state and local regulation of the types of interconnection that are available.^{18/} Separate federal and state interconnection arrangements appear technically infeasible. Even if they were feasible technically, the costs of requiring licensees to accept different arrangements in different jurisdictions cannot be justified. The types of interconnection arrangements available to PCS licensees should be determined at the federal level.

17/ Supra note 6, 7 FCC Rcd. at 5715.

18/ Id. at 5715-16.

VII. TECHNICAL STANDARDS SHOULD NOT UNNECESSARILY IMPINGE ON THE
MARKETPLACE EVOLUTION OF PCS

The Commission proposes "a technical framework that will permit significant flexibility in the design and implementation of PCS systems, devices and services."^{19/} Recognizing that PCS is an evolving concept, and that many PCS technologies are "at their inception," ^{20/} the Commission proposed an "approach to technical standards [that would] provide the opportunity for ... PCS services and technologies to develop fully."^{21/} NCTA endorses this general framework.

Consistent with this framework, NCTA supports the Commission's tentative decision not to establish a PCS advisory committee. The advisory committee was initially proposed in the Commission's October 1991 Policy Statement "to help resolve such technical issues as transmission standards, interference control, inter and intra industry protocols and roaming."^{22/} As the Commission recognizes, since the adoption of the Policy Statement major additional work has been done through industry standards bodies and FCC-authorized technical experiments. These activities will accomplish the purpose intended for the advisory committee, making the advisory committee unnecessary.

19/ Id. at 5716.

20/ Id.

21/ Id. at 5717.

22/ Policy Statement and Order, 6 FCC Rcd. 6601 (1991).

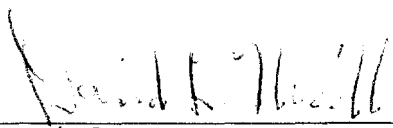
In Section I, above, NCTA explained the potential role of cable television companies as a competitive provider of a PCS infrastructure. The Commission's technical proposal appears to accommodate competitive infrastructures. In the process of developing technical regulations, NCTA urges the Commission to be mindful of the implications of its technical regulations and policies for the evolution of competitive PCS infrastructures. By adopting technical standards that are conducive to the availability of competitive PCS infrastructures, and maintaining a general policy of flexibility toward technical standards, the Commission will further the goal of efficient PCS services and infrastructures.

CONCLUSION

For the foregoing reasons, NCTA urges the Commission to adopt regulations consistent with these reply comments.

Respectfully submitted,

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